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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

TODD BARBOUR,

Appellant,

v.

NANCY SILVI-RODRIGUEZ,

Respondent.

B286142

(Los Angeles County  
Super. Ct. No. BP158433)

APPEAL from an order of the Superior Court of  
Los Angeles County, Maria E. Stratton, Judge. Affirmed.

Steven W. Kerekes for Appellant.

Valensi Rose, M. Laurie Murphy, Lynda I. Chung, and  
Rachel Balchum for Respondent.

## INTRODUCTION

This appeal arises from a trust petition filed by respondent Nancy Silvi-Rodriguez regarding a trust established by her late father, Malcolm Barbour.<sup>1</sup> Nancy alleged that her brother, Scott Barbour, engaged in elder abuse and stole millions of dollars from Malcolm and the trust. She also named several other respondents and amended the petition several times. In her fourth and fifth amended petitions, she included as a respondent an unnamed trustee, identified as Doe 1, of the BLT Living Trust (the BLT trust). Seven months after filing her fifth amended petition, Nancy amended the petition to substitute her other brother, appellant Todd Barbour, as Doe 1.

Todd moved to disqualify Nancy's counsel. He argued that her attorneys improperly elicited confidential information from him before naming him as a respondent to the trust petition, but without advising him of their adverse position or suggesting he retain his own counsel. The trial court denied the disqualification motion, finding insufficient evidence of an attorney-client or a confidential relationship between Nancy's attorneys and Todd. We find no abuse of discretion by the trial court and therefore affirm. We deny Nancy's motion for sanctions on appeal.

## FACTUAL AND PROCEDURAL HISTORY

### A. *Barbour family and the trust*

This case involves the Malcolm Barbour Trust dated November 30, 1994 (the trust). Todd, Scott, and Nancy are the

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<sup>1</sup> We refer to members of the Barbour family by first name for clarity because they share a surname. We adopt the same convention for Nancy, as she has in her respondent's brief. No disrespect is intended

adult children of settlor Malcolm Barbour and are named as beneficiaries under the trust.

In August 2012, Scott obtained a temporary restraining order purportedly protecting Malcolm from Todd. A few weeks later, Todd filed a police report with the Riverside County Sheriff's Department alleging elder abuse by Scott. According to Todd, "Scott was taking money out of Malcolm's bank accounts for his own personal use and without Malcolm's permission." At the investigating officer's request, Todd provided bank statements from the trust account and an account for Limetree Productions, Inc., a company Malcolm owned. After the officer interviewed Malcolm and he denied any wrongdoing by Scott, the investigation was closed as unfounded.

Malcolm died in July 2014. Prior to his death, the trust went through several restatements and amendments, many of which purported to alter the distribution of the trust assets among Malcolm's children and are thus at issue in the instant trust action.

**B. *Petition at issue***

Nancy initiated the trust petition December 2014 against Scott, individually and as trustee of the trust. She also named as a respondent Zachary Barbour (Scott's adult son), as well as various other individuals and entities. The petition alleged that Scott had taken advantage of Malcolm's failing health and engaged in financial elder abuse by taking millions of dollars from Malcolm's assets for his personal use, including transferring assets as gifts to himself and Zachary. Nancy sought an accounting of Malcolm's assets, Scott's removal as successor trustee of the trust, and recovery of assets taken from the trust, among other relief. She also sought to invalidate a restated

version of the trust from 2012 and to validate the May 21, 2009 version of the trust.<sup>2</sup> In essence, Nancy alleged that Malcolm had not intended to include Scott as an equal beneficiary with Nancy and Todd under the trust, but instead to leave him a smaller, one-time gift. However, once Scott gained “control of Malcolm’s assets,” he allegedly amended the trust to give himself an equal inheritance, while at the same time depleting Malcolm’s assets.

Nancy filed her third amended petition in August 2015 through her then-counsel. The third amended petition contained no allegations regarding Todd or the BLT trust, and did not name them as respondents. However, it did attach as an exhibit an unsigned document entitled “Restatement of Intent and Authorization to Distribute,” dated January 24, 2009 (2009 restatement). The 2009 restatement contains a purported declaration of intent by Malcolm that any monies already “distributed, gifted or loaned...to my children and their trusts...are theirs to keep,” and that any “discrepancy or inequality of monies distributed to any child was intentional.” The document also authorized distribution of \$2,500,000 each to

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<sup>2</sup>Nancy sought validity of the 2009 version of the trust in a September 28, 2016 supplement to her fifth amended petition. According to Nancy, Todd told her that Malcolm had executed this version. Todd then supplied a copy of the 2009 restated trust. That version of the trust included an initial distribution of \$5,000,000 each to Nancy and Todd; after smaller distributions to two grandchildren, the trust provided for equal distribution of the residue to Nancy, Todd, and Scott. The 2009 trust designated Todd as a successor trustee. By contrast, Nancy alleged that the 2012 version of the trust named Scott as a successor trustee and had no gift distributions to Nancy or Todd, and was “procured by forgery.”

“each child or their respective trusts; Scott Barbour/ZB Family Trust, Todd Barbour/BLT Family Trust, and Nancy Barbour-Rodriguez/Nancy Barbour-Rodriguez Family Trust.”

In October 2015, Nancy substituted in the law firm Valensi Rose, PLC as her counsel of record in the trust matter.

Nancy filed a fourth amended petition on April 4, 2016. According to the proof of service, the document was served the same day on Todd. This amended petition named “Doe 1, Trustee of the BLT Living Trust” as a respondent. Nancy alleged that the BLT trust, along with other named entities, was a shell entity controlled by Scott. She further alleged that the BLT trust received over \$2,000,000 in “funds wrongfully taken from the Trust,” including through checks from Malcolm’s accounts forged by “Scott and his agents” and made out to Scott, Zachary, the ZB Trust, and the BLT trust. Nancy also alleged that Scott created the 2009 restatement (which she again attached as an exhibit to her petition) and misappropriated her distribution under that document. The fourth amended petition further alleged that Nancy was “currently unaware of the true name of the trustee of BLT” as she had not yet obtained many bank records for Malcolm’s accounts.

Nancy’s fifth amended petition, filed on July 25, 2016, again named as a respondent Doe 1, trustee of the BLT trust. The attached proof of service shows service of the petition on Todd as a beneficiary by mail on July 25, 2016. In the fifth amended petition, Nancy alleged that “Scott created the BLT Living Trust . . . for the benefit of Todd, Scott and/or Zachary, making himself and Zachary as the successor trustees and remainder beneficiaries.” She further alleged that the BLT trust “knowingly received funds wrongfully taken” from the trust of

over \$2,500,000. Nancy acknowledged that “Todd is the only official signatory” to the BLT trust’s bank accounts, but alleged that Scott “still has access to BLT’s accounts.” In the fifth amended petition, Nancy explained that she continued to name the BLT trustee as a Doe defendant because she had “not obtained documentation verifying the true name of the trustee of BLT because neither Bank of America nor Scott produced a copy of the BLT Trust despite requests to do so.”

On November 21, 2016, Nancy filed an amendment to her fifth amended petition, substituting Todd for the Doe defendant as the trustee of the BLT trust.<sup>3</sup> According to the proof of service, Nancy served this amendment on Todd by certified mail, return receipt requested, on November 29, 2016. However, Todd claims he did not receive the fifth amended petition or the amendment naming him as the trustee of the BLT trust until January 2017.

Todd retained counsel in this matter in April 2017. Todd was deposed in May and June of 2017.<sup>4</sup> During the second session of the deposition on June 16, 2017, Nancy’s counsel, Lynda Chung, asked Todd questions regarding prior statements he had made to her about Malcolm, Scott, and the trust. Todd denied making many of these statements, but acknowledged that he had spoken to Nancy’s counsel about trust matters. He also testified about trust-related documents he had previously provided to an investigator for Valensi Rose.

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<sup>3</sup>According to the parties, shortly before this amendment, in the summer or early fall of 2016, the court ordered that any unnamed Doe defendants would be dismissed.

<sup>4</sup>Prior to naming Todd as a respondent, Nancy issued a subpoena to depose Todd as a witness in July 2016. According to Todd, he ultimately appeared at his deposition a year later in response to a deposition notice issued by counsel for Scott.

**C. *Motion to Disqualify***

**1. *Todd's motion***

On August 28, 2017, Todd filed a motion to disqualify Valensi Rose and attorneys Chung and M. Laurie Murphy. He argued that Nancy's attorneys obtained confidential information from him through improper means, namely, speaking with him/interviewing him while leading him to believe they were working together and failing to inform him that "they were adverse to him in any way, planned to sue him as the trustee of the BLT Living Trust, or should obtain his own counsel." He sought to disqualify Nancy's attorneys from representing her in the trust action; in addition, he asked the court to enjoin Valensi Rose from "disseminating any notes of any interviews taken of Todd Barbour and any work product derived from those interviews."

In his supporting declaration, Todd stated that Murphy and Chung interviewed him by telephone "more than twice in the last two years without informing me that they planned to name me in their petition as a Respondent. . . . During these interviews I was given the impression that . . . Chung and . . . Murphy . . . were acting on my behalf and in my interests." Todd claimed that Nancy first told him in October or November of 2015 that she had hired Valensi Rose as her new counsel and "they would be contacting me soon." Nancy purportedly asked him to talk to Chung to help with the case, and Todd agreed.<sup>5</sup> He

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<sup>5</sup>Todd also stated that "on several occasions," Nancy asked him for money "to help pay for her attorneys . . . since they were protecting my father's trust, defending his dignity, and trying to recover money that was allegedly ours." Todd gave Nancy \$15,000 "on one such occasion." Todd did not specify the date or

claimed that shortly thereafter, Chung called him and asked “numerous questions about the gifts and money which my father gave to my brother Scott, to me, and to my trust, the BLT Living Trust. She also asked me about my father’s physical condition and mental state and various other matters, which I answered to the best of my ability.” Todd declared that this first conversation “was at least an hour long.” Murphy also called him “a couple of times.”

According to Todd, Chung called again in December 2016 and asked “a lot of questions . . . about my father, his finances, gifts and money which my father had given to me and my brother, and told me that the information I gave was going to be helpful to our case.” This call also lasted about an hour. During this call, Chung also told Todd that he would need to sit for his deposition and that she would help prepare him.

Todd also claimed Murphy and Chung requested documents “to help them prosecute my sister’s action to recover assets for my father’s trust.” Todd stated that he gave some documents to Nancy, to her husband, and to Kevin Fahler, an investigator working for Valensi Rose.

Todd stated that he met Fahler on July 30, 2016, when Fahler came to Todd’s house to interview him. Fahler identified himself as working for the Valensi Rose firm. Fahler asked for documents “concerning my father, my brother, me and the BLT Living Trust, and he took some of my documents with him.” Todd claimed Fahler also asked Todd to pay him \$5,000 for his services, but Todd declined. Todd stated that Nancy later broke

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time period for this transaction, but stated that “[A]fter I gave my sister the \$15,000, she telephoned me again and identified . . . Chung . . . as one of our lawyers.”



into his home and took “all of my documents regarding this matter.”

Todd asserted that Chung and Murphy “gave me the impression that they were my lawyers when they were not.” He claimed he told them “things in confidence which I would not have discussed with them if I had known they were going to sue me as the trustee of the BLT Living Trust or seek to recover any of the gifts my father gave to me or my trust.” The information he shared included “what my father told me about his state of mind, how he felt about his children, the gifts that were made to each of his children, why he told me he made some of those gifts, and other related things that I personally observed when I lived with my father from approximately 2007 to 2012.”

According to Todd, he was served by mail with the fifth amended petition, as well as the amendment naming him as a respondent, in “the latter part of January 2017” (two months after the amendment was filed). He retained counsel a few months later.

## *2. Nancy’s opposition*

Nancy opposed the motion to disqualify. She argued that Todd lacked standing to bring the motion, because he had never had an attorney-client relationship with Valensi Rose, nor did the firm have any duty of confidentiality toward him.

In her supporting declaration, Nancy discussed assisting Todd in 2012 to retrieve bank statements related to the trust and Malcolm’s company, Limetree (Todd was a signatory on both accounts). Todd used these records to file the financial elder abuse complaint with the Riverside Sheriff’s Department, alleging that Scott had stolen millions of dollars from Malcolm.

Nancy provided a copy of the police report Todd filed with her opposition.

Chung also submitted a supporting declaration, in which she averred that Todd had never been a client of the firm. She stated that the first communication she had with Todd was when he called her and left a voicemail message on April 3, 2016. Prior to that date, Chung claimed that neither she nor Nancy knew who the BLT trustee was and they were “trying to determine” the trustee’s identity. On March 29, 2016, Chung served a deposition subpoena on Bank of America seeking records for the BLT trust account. She also served the subpoena on several individuals, including Todd, “just in case” one of them was the trustee of the BLT trust. In response, Bank of America produced copies of checks for several million dollars from Malcolm to the BLT trust.

According to Chung, Todd initiated contact with her by leaving her two voicemail messages on April 3, 2016 in response to the Bank of America subpoena and production of documents. She attached excerpted portions of the messages to her declaration. In one of the messages, Todd stated that “the BLT Trust was his trust.”<sup>6</sup> He also said that some of the checks from Malcolm to the BLT trust in the records were “forgeries that I never received.”

The next contact with Todd, according to Chung, was on April 12, 2016, when her investigator, Fahler, interviewed Todd at home. Fahler identified himself as an investigator working for the law firm representing Nancy. Fahler also obtained Todd’s

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<sup>6</sup>Nancy contends that she and her attorneys only received a copy of the BLT trust on January 19, 2017, after she named Todd as a respondent. That copy of the BLT trust was produced by Scott after the court granted Nancy’s motion to compel.

consent to record the interview. An excerpt of the transcript of the interview, reflecting Fahler's opening statements and Todd's consent to recording, was included with the opposition to the motion to disqualify.

Fahler stated that he visited Todd again on July 30, 2016 and took photos of the 2009 version of the trust with his phone. Fahler denied asking for money; instead, he claimed Todd offered to pay him \$500 for gas, which he declined.

Fahler served Todd with a deposition subpoena in July 2016, which sought production of records pertaining to the trust and the BLT trust, among others. According to Chung, Todd called her on August 1, 2016 in response to the subpoena. Chung stated that Todd was upset about being served with the subpoena, but nevertheless, "he went on and told me things he knows about various parties and witnesses in this matter." The conversation lasted for an hour and 40 minutes. Chung attached as an exhibit a copy of an email she sent to Nancy and Murphy discussing this conversation, with portions redacted as privileged. The email notes that Todd had received the fifth amended petition. Chung denied telling Todd that she would "coach" him for his deposition.

Chung stated that she, Nancy, and Murphy spoke with Todd again on August 5, 2016 about his upcoming deposition. Chung denied Todd's claim that she called him and "elicited his 'confidential information.'" Chung stated that whenever she communicated with Todd, she "always made it clear to him, verbally and in writing, that I represented [Nancy]. I have never misled Todd into believing that I was acting as his counsel. Nor did I dispense any legal advice to him. In fact, I explained to him

on numerous occasions that he needed to hire local counsel in L.A. to represent him in this case.”

Valensi Rose also sent a letter to Todd in February 2017. The month prior, Scott’s attorney filed a request for default against Todd in the trust action. In response and apparently confused regarding the responsible party, Todd called Nancy and demanded that she withdraw the “default judgment.” Murphy, Nancy’s counsel, sent a letter to Todd explaining that the request for default was filed by Scott. Murphy also suggested Todd contact her or Chung, or, “alternatively, you can have your lawyer call either of us.”

### 3. *Hearing and ruling*

The court held a hearing on the motion to disqualify on September 20, 2017. At the start of the hearing, the court inquired whether Todd’s counsel wanted an evidentiary hearing to cross-examine the declarants. Kerekes said he did. Nancy’s counsel responded, “I don’t think you need to get to that.”

Todd’s counsel argued that the information Todd disclosed to Valensi Rose was “clearly confidential,” citing to statements made by Todd concerning “what his father thought about his children, the gifts he gave them and why, his personal observations and opinions that he never would have given if he had known he was going to be named in a lawsuit.” He also noted that Todd was “not very well educated and very sick” and could not be expected to know his trust was named in the petition “like on page 40 or 41.” Murphy agreed that Todd was “ill” and “confused” but maintained that she and Chung “did not take advantage of him.”

The court took the matter under submission. In a written ruling issued October 19, 2017, the court denied the motion. The

court held that in order to seek disqualification, Todd was required to establish that he had either an attorney-client relationship or “a confidential nonclient relationship” with Nancy’s attorneys. The court found that Todd failed to “demonstrate the existence of an attorney-client relationship or other confidential relationship that would warrant disqualification.”

The court concluded that under the totality of the circumstances, “no attorney-client relationship existed between Todd and Valensi Rose and it was not reasonable for Todd to believe that any kind of attorney-client or otherwise confidential relationship had been created.” In particular, the court noted that Todd’s claim in his declaration that he had given Nancy \$15,000 to pay for attorneys—which he did several years before she hired Valensi Rose—was “worded in such a way to lead the reader to believe that the money was provided around the same time Valensi Rose was retained and not some years prior.” The court also discredited Todd’s claim that Fahler, the investigator, had demanded \$5,000 from Todd. As such, neither alleged fact supported Todd’s claim that he had an implied attorney-client relationship with Nancy’s attorneys.

Turning to the communications between Todd and Valensi Rose, the court concluded that “there was no attorney-client relationship express or implied.” The court continued, “[g]enerally, a witness being interviewed by an attorney regarding the attorney’s client’s case would not reasonably believe an attorney-client relationship existed between them or that the information he or she gave would be kept confidential. Rather, a witness would fully expect that the information he or she provides may be used in open court or that the witness may

be called to testify on the matter.” The court further rejected Todd’s assertion that Nancy’s attorneys gave him legal advice. Because Nancy was attempting to recover wrongfully obtained trust assets from Scott and Valensi Rose had contacted Todd as a witness, the court concluded that Todd could not have reasonably believed he was being represented by Nancy’s attorneys or that the information he provided “would be kept confidential and not used in the litigation.” Finally, the court rejected Todd’s argument that disqualification was warranted because Chung and Murphy were material witnesses.

Todd timely appeals from the court’s ruling denying the motion to disqualify.<sup>7</sup>

## DISCUSSION

### A. *Standard of review*

Generally, we review the trial court’s decision on a disqualification motion for abuse of discretion. (See *People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1143 (*Speedee Oil*); *McMillan v. Shadow Ridge at Oak Park Homeowner’s Assn.*, *supra*, 165 Cal.App.4th at pp. 964-965.) As our Supreme Court noted: “If the trial court resolved disputed factual issues, the reviewing court should not substitute its judgment for the trial court’s express or implied findings supported by substantial evidence. [Citations.] When substantial evidence supports the trial court’s factual findings, the appellate court reviews the conclusions based on those findings for abuse of discretion.” (*Speedee Oil*, *supra*, 20 Cal.4th at pp. 1143-1144.) When reviewing for an abuse of discretion,

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<sup>7</sup>The denial of a motion to disqualify counsel is an appealable order. (See *McMillan v. Shadow Ridge at Oak Park Homeowner’s Assn.* (2008) 165 Cal.App.4th 960, 964.)

“[t]he judgment of the trial court is presumed correct; all intendments and presumptions are indulged to support the judgment; conflicts in the declarations must be resolved in favor of the prevailing party, and the trial court’s resolution of any factual disputes arising from the evidence is conclusive.” (*Koo v. Rubio’s Restaurants, Inc.* (2003) 109 Cal.App.4th 719, 728; see also, e.g., *Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 300 (*Gregori*); *Schild v. Rubin* (1991) 232 Cal.App.3d 755, 762 [“We resolve all factual conflicts and questions of credibility in favor of the prevailing party and indulge in all legitimate and reasonable inferences to uphold the finding of the trial court if it is supported by substantial evidence which is reasonable, credible and of solid value.”].)

Todd urges us to apply the de novo standard of review, arguing that there are “no material disputed factual issues” and stating that he “accepts the trial court’s [factual] findings for the purposes of this appeal.” While he correctly states the accepted rule that “where there are no material disputed factual issues, the appellate court reviews the trial court’s determination as a question of law” (*SpeeDee Oil, supra*, 20 Cal.4th at p. 1144), we do not agree that the de novo standard of review is applicable here. Todd’s contention that the material facts are undisputed is not supported by his appellate briefs. Although he cites to certain undisputed facts, he also relies on numerous disputed facts that were material to the issues before the trial court, such as the date he was served with the fifth amended petition and its amendment, and certain details of the communications between him, Valensi Rose, and the firm’s investigator. We therefore review the trial court’s ruling under the abuse of discretion standard.

## **B.     *Analysis***

Todd asserts that he moved to disqualify on two different grounds: (1) that he was owed a duty of confidentiality by Valensi Rose through an implied attorney-client or non-client confidential relationship; and (2) that regardless of any such relationship, disqualification was proper because Valensi Rose obtained confidential information from him by improper means. We examine each in turn.

### *1.     Disqualification based on attorney-client or confidential relationship*

“A trial court’s authority to disqualify an attorney derives from the power inherent in every court ‘[t]o control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto.’ [Citations.]” (*SpeeDee Oil, supra*, 20 Cal.4th at p. 1145.) “Exercise of that power requires a cautious balancing of competing interests. The court must weigh the combined effect of a party’s right to counsel of choice, an attorney’s interest in representing a client, the financial burden on a client of replacing disqualified counsel and any tactical abuse underlying a disqualification proceeding against the fundamental principle that the fair resolution of disputes within our adversary system requires vigorous representation of parties by independent counsel.” (*Mills Land & Water Co. v. Golden West Refining Co.* (1986) 186 Cal.App.3d 116, 126.)

“Generally, before the disqualification of an attorney is proper, the complaining party must have or must have had an attorney-client relationship with that attorney.” (*Great Lakes Construction, Inc. v. Burman* (2010) 186 Cal.App.4th 1347, 1356.)



In the absence of an attorney-client relationship, “some sort of confidential or fiduciary relationship must exist or have existed before a party may disqualify an attorney predicated on the actual or potential disclosure of confidential information.” (*Ibid.*, citing *Dino v. Pelayo* (2006) 145 Cal.App.4th 347, 352–353; see also *DCH Health Services Corp. v. Waite* (2002) 95 Cal.App.4th 829, 832 [“Standing [to seek disqualification] arises from a breach of the duty of confidentiality owed to the complaining party.”].)

Applying these principles, the trial court found that Todd and the Valensi Rose attorneys had neither an attorney-client relationship nor any other type of confidential relationship that would give rise to a reasonable expectation of confidentiality.<sup>8</sup> Todd does not challenge the court’s finding that he lacked an attorney-client relationship. Instead, he cites several cases that find a duty of confidentiality between an attorney and a non-client. None are applicable to the facts at issue here, as each involves “the conjunction of (1) implicit obligations a lawyer takes on to maintain the confidences of a nonclient received in the course of representing a client, and (2) the unfair advantage that might accrue were such a lawyer to pursue substantially related litigation against the nonclient.” (*Acacia Patent Acquisition, LLC v. Superior Court* (2015) 234 Cal.App.4th 1091, 1099 (*Acacia*)).

For example, *Acacia, supra*, 234 Cal.App.4th 1091 involved three successive engagements. In the first, patent owners hired a law firm to represent them in patent litigation, which subsequently settled. In the second, that law firm hired a second law firm (AlvaradoSmith) to represent it in a fee dispute against

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<sup>8</sup>We note that Todd repeatedly mischaracterizes the trial court’s analysis as limited to whether Todd had an attorney-client relationship with Valensi Rose.

the patent owners. In the third, a former consultant sued the patent owners for breach of a consulting agreement. The consultant retained AlvaradoSmith. (*Id.* at pp. 1094-1095.) The court granted the motion by the patent owners to disqualify AlvaradoSmith from representing the consultant, based on “the unique circumstances inherent to the representation of attorneys against their former clients (such as occurred here in Matter No. 2) and the substantial relationship between Matters No. 2 and 3.” (*Id.* at p. 1097.)

In *Kennedy v. Eldridge* (2011) 201 Cal.App.4th 1197, 1205, the father in a custody dispute retained his father (the paternal grandfather) to represent him against the mother. The paternal grandfather previously represented the maternal grandfather in a divorce proceeding. The court found no abuse of discretion in the trial court’s disqualification of paternal grandfather, concluding that “[t]he trial court could reasonably find there was a significant danger that—as a result of its prior involvement in her father’s divorce case—the [paternal grandparents’] firm acquired relevant confidential information about [the mother] to which it otherwise would not have had access.” (*Id.* at pp. 1206-1207.)

The reasoning of these cases does not compel reversal here. Although the courts in these cases extended the successive representation framework to include a duty of confidentiality owed to non-clients, that duty was nevertheless linked to confidential information obtained by the attorney through a former representation, and the former representations were found to have some relevance to the case at hand. Here, by contrast, Valensi Rose obtained information from Todd as a witness to use to support its client in the same action. The trial

court found no such duty of confidentiality here, and we find no abuse of discretion in that determination.

2. *Disqualification based on improper conduct used to obtain confidential information*

The principal thrust of Todd's appeal is that Valensi Rose should be disqualified for eliciting confidential information from him through improper means, regardless of the lack of an attorney-client or confidential relationship. In his opening brief, he asserted that a "line of case law" allows disqualification of an attorney by a non-client where the latter's "confidential information is obtained through improper actions or outright misconduct by the attorney." Todd fails to cite any such cases in this section of his brief. However, he did cite supporting cases elsewhere in that brief as well as in his papers below.

These cases do recognize an exception to the general rule requiring the party moving for disqualification to establish an attorney-client or other confidential or fiduciary relationship with the attorneys sought to be disqualified. Under this exception, the moving party may seek disqualification if he or she has a sufficient "personal stake" in the motion, or if the ethical breach upon which the motion is based is so "manifest and glaring" that it triggers the court's inherent duty to manage the conduct of the attorneys appearing before it and to ensure fair administration of justice. (*Great Lakes Construction, Inc. v. Burman, supra*, 186 Cal.App.4th at p. 1357 [party had no "legally cognizable interest" to disqualify opposing counsel based on violation of that counsel's duty of loyalty to two clients]; see also *Gregori, supra*, 207 Cal.App.3d 291, 300 [no disqualification where attorney for plaintiff dated secretary at law firm representing defendant]; *County of Los Angeles v. Superior Court* (1990) 222 Cal.App.3d

647, 658 [disqualification of plaintiff's counsel who had ex parte communication with expert witness for defendant].)

Todd argues that Nancy's attorneys committed ethical breaches allowing them to obtain his confidential information, thus warranting their disqualification from the case. He further contends the trial court failed to consider this argument. While the trial court did not make express findings regarding Todd's claims of misconduct, it did find that certain claims made by Todd lacked credibility and that Murphy and Chung contacted Todd as a witness before deciding to name him as a respondent. These are factual findings we will not disturb on appeal. Further, to the extent Todd claims Murphy and Chung committed misconduct by leading him to believe he was in an attorney-client or otherwise confidential relationship with them, the court rejected this claim and concluded that any such belief was unreasonable under the circumstances. We are bound by a trial court's credibility findings on appeal. (See *Tribeca Companies, LLC v. First American Title Ins. Co.* (2015) 239 Cal.App.4th 1088, 1102.)

In any event, we need not reach the issue of the trial court's findings (or purported lack thereof) of attorney misconduct, as Todd must also demonstrate that he shared confidential information with Valensi Rose in order to seek disqualification. We conclude that he has not made this showing. While he has not identified any specific information he disclosed to Valensi Rose that he contends was confidential, Todd has outlined several categories: information about Malcolm and his physical and mental state; gifts and money from Malcolm to Scott, Todd, and the BLT Trust; and "personal and embarrassing events in [Todd's] life," including that Scott tried to drown Todd. First,

Todd fails to demonstrate how any of the information he purportedly disclosed about Malcolm, Scott, or any other third party was confidential to *Todd*. “It is well settled that the right of privacy is purely a personal one; it cannot be asserted by anyone other than the person whose privacy has been invaded. . . . [Citations.] Further, the right does not survive but dies with the person.” (*Hendrickson v. California Newspapers, Inc.* (1975) 48 Cal.App.3d 59, 62.) Moreover, the record indicates that Todd also disclosed information regarding Malcolm’s failing health and mental state and Scott’s activities under the trust to other parties, including the Riverside Sheriff’s Department when filing an incident report. Thus, he has not demonstrated that information he shared with Valensi Rose was confidential.

Todd similarly fails to show that any of the personal information he revealed was both confidential and advantageous to Nancy’s case. (See *In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572, 587; *Gregori, supra*, 207 Cal.App.3d at p. 305 [no evidence attorney obtained “confidential information useful to his clients”].) His statement that Scott tried to kill him was repeated in a voicemail he left for Nancy. He also points to a statement that his house was red-tagged for vermin, but makes no showing how such information would be material to or advantageous for Nancy’s trust petition.<sup>9</sup> On appeal, Todd

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<sup>9</sup>We also note that Todd appears to be in the unusual position of having an advantage on both sides of this dispute. His statements regarding Scott’s behavior and Malcolm’s apparent lack of capacity could support the reimbursement of money given to him and to the BLT trust. On the other hand, if Nancy is successful in validating the 2009 version of the trust and in recouping trust funds allegedly stolen by Scott, it appears that

contends he also disclosed “personal financial information” to Valensi Rose. But there is no evidence in the record of any such disclosures. In short, Todd has not met his burden on appeal to demonstrate that confidential information was disclosed. In reaching our holding, we express no opinion on Todd’s ability to seek exclusion from this case of any evidence he contends was wrongfully obtained and/or withheld.

Todd also argues that Valensi Rose “itself believed that the information they were soliciting from Todd was confidential” because the firm has “failed to produce” non-redacted versions of Todd’s voicemails and his interviews with the investigator. These allegations are unsupported by the record on appeal. Although Valensi Rose submitted only portions of these documents as part of its evidentiary showing in opposition to the motion to disqualify, the record does not reflect why it did not submit the full documents. Nor does Todd point to any evidence that these documents were improperly withheld following a request by Todd.

Finally, Todd argues for the first time on appeal that disqualification of Valensi Rose is warranted based on the law firm’s violation of Code of Civil Procedure section 474 by failing to name Todd as a respondent as soon as Chung and Murphy knew his identity as the trustee of the BLT trust. Todd has forfeited this argument, as he failed to raise it below. (*Newton v. Clemons* (2003) 110 Cal.App.4th 1, 11 [“Generally, issues raised for the first time on appeal which were not litigated in the trial court are waived.”]; *Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2008) 163 Cal.App.4th 550, 564

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she and Todd would receive much larger distributions under that instrument.

[““Appellate courts are loath to reverse a judgment on grounds that the opposing party did not have an opportunity to argue and the trial court did not have an opportunity to consider.””].) We also note that Todd did not object to the amendment at the time based on Nancy’s purported unreasonable delay. (See *A.N. v. County of Los Angeles* (2009) 171 Cal.App.4th 1058, 1065 [“unreasonable delay in filing an amendment after actually acquiring . . . knowledge [of a defendant’s true identity] can bar a plaintiff’s resort to the fictitious name procedure”].)

**C. Motion for sanctions**

Nancy filed a separate motion for sanctions on appeal, claiming that Todd’s appeal lacked merit and was brought to delay the trial in this matter. We may impose sanctions when it appears “that the appeal was frivolous or taken solely for delay.” (Code Civ. Proc., § 907; Cal. Rules of Court, rule 26(a).) “[A]n appeal should be held to be frivolous only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit.” (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) Our Supreme Court has cautioned that, in order to “avoid a serious chilling effect on the assertion of litigants’ rights on appeal,” this punishment must be used “most sparingly to deter only the most egregious conduct.” (*Id.* at pp. 650-651.) Under this standard, we cannot deem Todd’s appeal to be frivolous.

### **DISPOSITION**

The judgment is affirmed. The motion for sanctions is denied. Respondent is awarded her costs on appeal.

### **NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

COLLINS, J.

We concur:

MANELLA, P. J.

DUNNING, J. \*

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\*Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.